UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION
_____

Master File 12-md-02311

Hon. Marianne O. Battani

In Re: Wire Harnesses
_____

THIS TRANSCRIPT RELATES TO:

Case No. 14-cv-14451

All Truck and Equipment Dealer Actions

_____/

MOTION HEARING

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Tuesday, October 6, 2015

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Detroit, Michigan

Tuesday, October 6, 2015

at about 2:10 p.m.

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(Court and Counsel present.)

THE LAW CLERK: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

THE COURT: Good afternoon. It's kind of strange to see so few of you here. Okay. Let's start -- for no other reason than I have them in this order, I'm going to start with the collective motion, defendants' motion, so who is going to argue that?

MR. MAJORAS: Good afternoon, Your Honor. John Majoras from the Jones Day firm on behalf of the Yazaki defendants, and for purposes of this motion on behalf of the wire harness defendants.

Before I begin, may I approach, Your Honor, just to hand up a few slides that I will be referring to?

THE COURT: Certainly.

MR. MAJORAS: Your Honor, as a fair point, I noticed as the Court personnel were walking in with their large set of binders it seems to be a fair question about if

we can boil this down into 12 or 13 slides why we couldn't have done that in the briefing, and it is actually --

THE COURT: Yes, before I read it, that would have been nice.

MR. MAJORAS: It actually goes directly to the merits of the argument on the statute of limitations, Your Honor. Fundamentally this is a straightforward statute of limitations issue. The 6th Circuit law is very clear on the requirements for when the statute of limitations begin to run, the standard is straightforward. There is actually very little debate as to the amount of publicity and information that was in the public arena going back into the February 2010 time frame. And the only reason I think that we have such an interesting issue, if you will, about statute of limitations really goes down to the fact that the plaintiffs, after they had filed their initial complaint, and after we had responded with a motion to dismiss on the statute of limitations, realized the one event they point to as triggering the statute of limitations and giving them notice put them outside of the limitation period for a number of their state claims. So at issue in this case are the three-year statute of limitations and four-year statute of limitations.

THE COURT: Okay. Mr. Majoras, before you go on, it just occurs to me, I'm sorry, I didn't get the appearances

of the other attorneys. Just for the record I would like to have that clear. Okay.

MS. FISCHER: Michelle Fischer, Your Honor, from Jones Day as well, on behalf of Yazaki and the rest of the defendants today.

MR. JACKSON: Good morning, Your Honor. Tiffany Lipscomb Jackson, Jones Day, on behalf of Yazaki and today on behalf of the collective defendants.

THE COURT: Plaintiffs, you're confusing because you are on opposite ends of the courtroom here.

MR. PARKS: Your Honor, Manly Parks from Duane Morris on behalf of the Rush entities, with my colleague Andrew Sperl.

THE COURT: Thank you. I just wanted to make sure the appearances are noted.

MR. MAJORAS: As I was mentioning, the only issue that seems to have brought on this question on the issue on the statute of limitations results from the efforts by the plaintiffs once they realized that they had missed the statute of limitations was to amend their complaint while our motion was pending, and in doing so trying to scramble to find some type of a factual allegation they could make that otherwise explains why their complaint was timely.

The statute of limitations in this case relate to state statutes, these are indirect purchaser claims, and the

state statutes that we are moving on are three-year statute of limitations and four years.

THE COURT: Four years?

MR. MAJORAS: Yes, ma'am, and we have in our briefing papers, I think it is an Exhibit A to our brief, we have a chart demonstrating where all of these fit and it is part of what I just handed up to you.

The fundamental issue as we get back to it, before we get into what happened about the allegations in the complaint, the changes and why they had to be made, is really the straightforward one that I started with you. In this case there is no doubt and the plaintiffs in their -- the Rush Truck plaintiffs in their briefing note on page 2 of their opposition that they do not contest that there was substantial publicity about the Department of Justice investigation into the wire harness industry.

They also acknowledge that the defendants are essentially the same parties that were identified in that substantial publicity and that the wire harnesses, which is the product at issue for purpose of this motion, the wire harnesses are fundamentally the same products that are being supplied to truck and equipment suppliers.

As we point out on section 2 of the handout --

THE COURT: Can I ask you a question on that because I was trying to determine this throughout all the

motions? In the wire harness -- the wire harness itself, I know now we call it vehicle wire harness, is there some difference in a truck, is a wire harness made with heavier wires or something because it is a truck, or is it the actual same product?

MR. MAJORAS: Well, the wire harnesses across any vehicle, whether it is a truck, a light truck, a car, are going to have differences depending on what the requirements are of the manufacturer. Some will have particularly heavy loads, some will have further distance that the wires need to travel.

THE COURT: That's true amongst the cars too, the automobiles?

MR. MAJORAS: Yes, ma'am, but the wire harness -- a wire harness as such is delivering power to certain parts of the vehicle that need power, and fundamentally there is no difference between how that works in trucks versus how it works in cars.

THE COURT: I know the definition is the same but I didn't know if the product was the same.

MR. MAJORAS: Yes, ma'am.

THE COURT: Okay.

MR. MAJORAS: As we point out, it is curious that in the plaintiffs' briefing in this motion they seem to make no effort to refer to 6th Circuit law. Obviously that's the

controlling law in this jurisdiction and in this case with relation to statute of limitations the case law is very clear, as we point out in our briefing and the highlights are on page 2 of the handout, we have the Dayco opinion which is the one that talks about it is an objective test as to when someone should be -- someone's suspicion should be excited. There is information in the record by which somebody could look at that and say I wonder if this applies to me or maybe it applies to me. It is nothing more than that. It is not a situation where you have to have the specific facts of every part that will make up the claim, and that's made very clear in the Ball case, Your Honor, in which the case makes very clear that the relevant inquiry is an objective one, and that a definite link between the published information and the potential claim need not be established with finality. Does it raise the curiosity of somebody who may have a complaint?

Now, Your Honor is well aware of the curiosity that has been raised in these cases as indicated by the number of complaints that have been filed over time, and particularly it is noteworthy that with respect to wire harnesses until the Rush Truck complaint was filed the last one was filed in 2014, February 20, and that's an important date because the date in which the substantial publicity, the phrasing that the plaintiffs use and acknowledge in their own briefing, the substantial publicity began immediately after the Department

of Justice announced its investigation in February of 2014 and continued throughout that year, and it certainly continued as claims were being filed in this Court.

Plaintiffs have not in their briefing contended that the Court cannot take judicial notice of that publicity, it is certainly something that is done throughout the case law and we have cited the cases indicating that the Court may view that publicity in deciding this motion, and certainly that this motion can be decided on a motion to dismiss. It is a fairly typical thing to have statute of limitations issues decided on motions to dismiss.

So we have for you the fundamental issue of there's substantial publicity relating to wire harnesses, these defendants, that occurs throughout February and into the calendar year of 2010. The Rush plaintiffs do not file their case until November of 2014, approximately four and-a-half years after the publicity began of which they acknowledge. That really is the end of the inquiry, there is nothing more that needs to be done because the case law is very clear that at the time the publicity comes out they are on constructive notice of it and their claims can then be brought within whether it is a three-year or four-year period.

This is not a situation where the curiosity is whetted, if you would, and the plaintiffs are obligated within a day or so or a week or whatever the case might be to

file their claims. Under the relevant state statutes there's three years or four years to determine what that publicity might mean, to observe what is taking place in this Court, and to observe the various other activities that are happening relating to wire harnesses and the ongoing investigation that occurs throughout 2010 and 2011.

Yet the plaintiffs contend that that's not enough, it is not until some period later -- well, actually that's not right, Your Honor, because their first contention was that was enough. Their initial complaint in this case says that they were looking to a plea by Furukawa on wire harnesses that took place in 2011 -- September of 2011 related to wire harnesses. The plea itself talks about automobiles, nothing beyond that. And in their first complaint they say this is sufficient to give us notice to -- that we have a complaint to file.

Now, that date I think is chosen because it does fit within the four-year statute of limitations. Our contention quite clearly is that the publicity was strong enough going back into earlier 2010, that the statute started running in the February time period of 2010.

We filed our motion. The plaintiffs recognize there were problems at least in those states where there is a three-year statute of limitations because even their allegations of the Furukawa plea doesn't cure that, and now

they scramble to find something new. The best thing they can come up with is that there is a report out of Japan, the JFTC, the Japan Fair Trade Commission, in which there is a comment specifically about heavy equipment and somehow that actually is what triggers the curiosity they should have had going back to February.

THE COURT: That was on the bearings?

MR. MAJORAS: Yes, ma'am. So, Your Honor, on page 4 and 5 of our slides we summarize the publicity that makes up a large chunk of the binders that everyone was carrying in because there was a great deal of publicity which talks about the investigation into wire harnesses, talks about it being in the automotive, area which we think is actually a key point. If we are going to get into wordsmithing in this case which, as I said, Your Honor, I don't think is necessary under the objective standard of the 6th Circuit, but if we are going to get into wordsmithing the plaintiffs only talk about automobiles and they point to a couple of the plea agreements, and the Furukawa plea agreement, which was good enough for them, by the way, the first time they filed their complaints, those pleas related to automobiles, but as you can see from the publicity there is a great discussion of automotive, and combining them we cite the Merriam-Webster Dictionary term of automotive which is obviously something broader than simply automobiles, but

even beyond that if we go back and we talk about the fact that these are wire harnesses, these are the same suppliers, the same type of equipment that's used in trucks, that are used in cars, that are used in automotive vehicles, then the plaintiff should have been on notice in February of 2010, just like every other wire harness plaintiff in this case, and filed their claim within the applicable statute of limitations in the states under which they are bringing their claims.

That's the point I think we make in our sixth slide, Your Honor, which is fundamentally there are a few things known that are important to deciding this motion in terms of the suppliers of the wire harness were the same suppliers that were identified in the publicity, the wire harnesses were the same, and that even with respect to the original equipment suppliers that were identified in that publicity many of those make a variety of vehicles including even into the trucks.

Your Honor, whether the Court decides to look at this as we believe it should be the case which is simply looking at the abundant publicity in 2010 and the objective nature of the inquiry in terms of whetting the curiosity of a potential claimant, or if you want to go through and parse the language and what is automotive and what is automobile, the result is still the same. The plaintiffs have missed the

statute of limitations with respect to the three and four years in the states that are at issue and the claims that go back farther than that are going to be barred, and on page 7 of our slides we identify the specific states, it is also abundant throughout our briefing but it gives you a quick rapid demonstration that those states that have a three-year statute of limitations and a four-year statute of limitations, and then on slide 8 we talk specifically about the -- those states and which claims are barred under those states.

As I began my presentation, Your Honor, I talked about that perhaps for an observer this issue becomes more interesting if look at what happens after we point out to the plaintiffs that they have missed at least the three-year statute of limitations and we believe the four-year statute of limitations, and then we see there is an amendment to the complaint, there is briefing back and forth about whether one can do that or not but, Your Honor, one doesn't forget, it could be the operative part of a complaint but if one is saying in November this is what triggered it that's not a memory that just disappears because the pleading is different, the pleading that they have, the factual allegations that they have in their initial complaint is something that the Court ought to be considering, but going back the basic issue here is whether there was -- whether

there was sufficient publicity in February of 2010 that these plaintiffs should have been on notice, should have had some curiosity as to whether or not they had a claim here, and they should have brought their complaint within the time periods allowed by the three- and four-year statute of limitations.

Your Honor, unless you have some questions about the statute of limitations issue I would like to turn briefly to two other topics?

THE COURT: All right.

MR. MAJORAS: The first is the interstate nexus standard, and this is an issue that the Court has had to address on a number of the cases before it, and this relates specifically to Mississippi, Nevada, New York, South Dakota and West Virginia. And in this case the plaintiffs make no effort whatsoever to aver any factual allegations that there was an effect that occurred in these states, and these states have their statutes which require that there be an interstate connection between the harm that is being alleged here. In this case the plaintiffs make no effort to try to satisfy that burden, and they try to conflate in their response to the briefing the issue between the Constitutional standing and then really ignore the issue about the standing within -- or the state requirements in those states, and this is all we are asking the Court to do is to treat these cases

consistently with the many rulings you have already issued.

The plaintiffs try to use those rulings to say these rulings prove we have a claim, but if you look to the rulings, and these are on page 9 and we summarize some of them, in some of the other cases, whether it is fuel senders or IPC or the OSS cases, there the Court made very specific findings that factual allegations had been made that make the connection necessary to at least pursue the claims in those states. Here the plaintiffs have not done that. There is nothing that satisfies the interstate nexus requirements needed of these states, and based on the Court's previous rulings these claims should also be dismissed.

THE COURT: Okay.

MR. MAJORAS: Your Honor, as I was walking over to the Court this morning it occurred to me I have the honor to actually address an issue that has not yet arisen in this Court, and that's the State of Vermont. To do that if you go to page 10 --

THE COURT: That big state?

MR. MAJORAS: Yes, ma'am. And if you look at page 10 of our brief -- or our materials that we handed up you see the state shown there. And this is a question of whether under the VCFA, the relevant Vermont statute that is being used by the plaintiffs in this case, whether these plaintiffs, who are dealer plaintiffs, business plaintiffs,

have standing to bring claims, and the statute is very clear, it is the people of Vermont, it is individuals, consumers, who have the claim that can be brought under the VCFA. So it is very clear under the plain language of the statute that only a consumer can bring a VCFA claim, and, in fact, the statute defines the consumer, and these points are on page 11 of our slides.

As defined by statutes consumer does not include a plaintiff who makes purchases for resale. By definition that's what dealers are, they are not consumers, they are buying vehicles or whatever their products are that they are selling and they are trying to resell them ultimately to end consumers whether in Vermont or elsewhere. Plaintiffs' pleadings couldn't be any clearer that they are a dealer. We even go through and parse the language of what a dealer means in our slides, I won't bore you with that because I think it is very plain, a dealer is a reseller, a dealer is not a consumer, and there should be no doubt whatsoever that the plaintiffs cannot bring claims on behalf of consumers in Vermont or that there is no one in the plaintiff group that has a claim under the State of Vermont because they are not consumers, and those claims should also be dismissed.

THE COURT: Okay.

MR. MAJORAS: Your Honor, there is one other point I am going to raise because I suspect it will come up in MR.

PARKS' presentation, and that is, as you know, we have also made a motion that the claim should be dismissed under the Twombly standard. That, as you are quite aware, is not a new issue that we have raised with the Court, and quite certainly one of the reasons we raised it is in part for record purposes in this case, Your Honor.

THE COURT: Okay.

MR. MAJORAS: But here it is a bit unique because of the tension created by the plaintiffs' claims in terms of what they say in response to the Twombly where they are saying we do have a plausible claim and how they are responding that they nonetheless had any -- no curiosity should have been raised because of the publicity in this case. That is they are saying there is a plausible claim, but if you look at the particular points in this case where they go back to whether it is the plea agreements or the other activities that occur as part of the DOJ investigation, they run into the problem that they are not, in fact, talking about trucks, they are not talking about equipment, we don't think that is sufficient, certainly under the statute of limitations, we think that the publicity is clear enough that it covers all of that, but the plaintiffs are taking this position that these same facts, these same allegations now give them a plausible claim in part because they point to pleadings of other products, pleadings of other defendants,

and that's sufficient to give them a plausible claim, yet when they look to the arguments on the statute of limitations there is not even enough to give them curiosity.

That can't be the case, Your Honor, and we believe if the 6th Circuit law is applied as it is clearly written the statute of limitations that we have detailed in our briefing are applicable, should be applied and under the relevant states claims prior to or longer than three years in those states, and longer than four years in the others, should be barred by this Court. There is nothing further.

THE COURT: Thank you, Mr. Majoras.

MR. MAJORAS: Thank you, Your Honor.

THE COURT: MR. PARKS?

MR. PARKS: Good morning, Your Honor.

THE COURT: It seems like the plaintiffs are dancing on a fine line between this statute of limitations and the allegations in their complaint?

MR. PARKS: Well, Your Honor, the defendants would characterize it that way but I wouldn't, and the reason I wouldn't is because I think that the two questions require different perspectives. When you're looking at the question of plausibility under Twombly you have the benefit of hindsight, you can look back and you can look at the events and you connect the dots because you know where you are today. When you are considering what information should

excite the plaintiff to be -- to investigate you're forward looking, you are looking at a plaintiff who doesn't have the advantage of knowing where the story ends, which the plaintiff who is pleading the claim does have that advantage. So in this particular instance it is not until we have some information that the conspiracy goes beyond cars, goes beyond passenger vehicles, and that comes with the bearings announcements as we have indicated in the briefing, that the Rush Truck plaintiffs are put on notice that, wait a second, this isn't just about cars and wire harnesses, this is about wire harnesses and other things too.

THE COURT: But why wouldn't they be on notice when they hear about wire harnesses? I mean, it is a vehicular wire harness, it goes into all of these vehicles as I understand it?

MR. PARKS: Well, in a general sense, yes, wire harnesses are wire harnesses, and we certainly are contending that this is part of a broad conspiracy about wire harnesses. The point I think that defense counsel glossed over a little bit, although he hinted at it, is there are quite different grades of wire harnesses for trucks, for heavy equipment, and you would imagine that. You would probably need a different kind of wire harness for a compact car than you would need for a road grader or a bulldozer because you're carrying different loads of electricity, different distances and so

forth. There has been some suggestion -- now, we agree that wire harnesses generally perform the same function in trucks as in cars and in heavy equipment as in cars, but the idea that parts for cars and parts for trucks or parts for cars and parts for heavy construction equipment are obviously the same thing and you should inquire about one because there is a conspiracy about the other I think goes too far, particularly here where we are talking about a pleading standard. This is a 12(b)(6) motion, and so I think that here where we are arguing and we are advancing the notion that the scope of the conspiracy, the public information about the scope of the conspiracy was such that there was no indication that it branched out beyond automobiles, beyond passenger vehicles in the commercial vehicle space, that's enough under the 12(b)(6) standard to get through a motion to dismiss and, indeed, we even cite cases that says that's enough to get past a Rule 56 motion for summary judgment, it is inherently a fact question for the jury to evaluate about whether that distinction -- the distinction between cars or passenger vehicles on the one hand and commercial vehicles on the other is a meaningful one.

Now, Your Honor, if I might approach for a moment?

THE COURT: All right.

MR. PARKS: I have here a slide which should indicate some visual representation of what I'm talking about

here a little bit, although I think the point has been made fairly clear nevertheless. Ours is the first complaint in this entire proceeding that talks about something other than passenger vehicles, that's undisputed, that's quite clear. It is also I think undisputed that there is no mention of trucks until the EC, the European Commission competition authority, announces that there is some enforcement action with respect to bearings in automobiles and trucks in March of 2014. There is no --

THE COURT: 2013, right?

MR. PARKS: No, 2014, Your Honor. 2013 was industrial machinery bearings and that was the Japan Fair Trade Commission.

THE COURT: All right.

MR. PARKS: And before then there were no enforcement actions involving anything other than cars. Now, there is some language games perhaps I would say where the word automotive is being dissected; auto means goes by itself, motive means move, we look at the Latin roots or the Greek roots or whatever and say, oh, well, that means it is anything that moves by itself, but that seems to go too far. It is pretty clear when you look at the press releases and the statements by the enforcement authorities, by our Attorney General Eric Holder and by the deputy attorney generals who speak to this, they specifically talk about

cars, this was all about cars. And in that sense it puts it into a false box, Your Honor, to say this is really about wire harness, and wire harness is in everything, anything that moves, a wire harness in a Segway scooter should have been on notice, wire harness in a forklift should have been on notice.

Now, I think that's a question of fact, and the cases we have cited I think make it pretty clear it is a question of fact.

For example, there is a case we cite called In re: Board of Education of Evanston, and that case involved claims of bid rigging, and the court was considering allegations of whether the publicity about bid rigging by the same very defendants on the very same types of projects in downstate Illinois should have put the plaintiff on notice of a bid-rigging conspiracy in upstate Illinois. In that case the court even acknowledges in the text and a footnote, even in the publicity about downstate Illinois there was some references to some upstate Illinois activity, and the court said even those references aren't clear enough, it was about the scope of the conspiracy and the general publicity was about the scope of the conspiracy being a downstate Illinois conspiracy.

The plaintiff said well, that didn't put us on notice of the upstate Illinois conspiracy we are complaining

about, even if it is the same one, it is just bigger than we thought. And the court says -- I think it is a Rule 56 motion if I recall correctly, even a Rule 56 summary judgment that's a question for the jury, and if it is a question for the jury on Rule 56 in that scenario where you are talking about geographic scope, as opposed to the scope of the products involved, which is what we are talking about here, then it has to be here as well.

In fact, Your Honor has also considered this same question in the context of this case, at least the question about the scope of the conspiracy and what is sufficient to put plaintiffs on notice. So in the occupant safety restraints case the defendants argued, hey, these raids back in 2010 on Tokai Rika in wire harnesses should have put you on notice about potential price fixing with respect to occupant safety. And this Court noted that those were two different things and it is a question of fact ultimately anyway, and that's exactly what it is here again today, a question of fact, so --

THE COURT: What exactly would a jury do with that? I mean, just think about this. They get information about whether plaintiff should be on notice in 2010, what are they going to judge on, what more than what we have in these briefings right now would there be for these jurors to make a determination?

MR. PARKS: Well, Your Honor, I believe we'll be able to present significant evidence that the truck world, the heavy equipment world and the car world are different worlds. That if you are -- you don't see a lot of dealerships for example where you can buy a compact car next to a road grader or a bulldozer. You don't see a lot of places where you can buy a class-A, heavy-duty trash truck next to a F-150 pickup truck, a light-duty passenger truck. These are different worlds, you deal with different customers who are buying different products for different purposes. There is a fundamental distinction, and we think we'll be able to present ample evidence of it to the jury, that passenger vehicles are a different world than commercial vehicles. And we think that that evidence will help the jury conclude that publicity about price fixing of passenger vehicle components is something different than -- that it wouldn't necessarily put a reasonable person on notice of price fixing on those same types of components in commercial vehicles.

THE COURT: Okay. Thank you.

MR. PARKS: So as the slide deck shows our case involves heavy-duty vehicles, the first couple of slides are heavy-duty, class-A trucks at various configurations, medium-duty trucks, think of the box truck that delivers the stationery supply or a mattress or something, agricultural

equipment, for example, tractors, four-by-four ATVs that are used in agricultural applications, transportation would be buses, there are also construction equipment, as I mentioned, mining equipment. And, again, generally the point is our case involves commercial vehicles, not passenger vehicles. And the publicity issue is really a question, as I said before, of scope and the court -- the courts recognize that the scope of publicity is really a question of fact to be assessed by a jury, and this Court has, indeed, recognized that in its own decisions, as I have mentioned.

Now, there is here I think two different questions in terms -- or there are here I think two different questions about the statute of limitations. One question involves the discovery rule, and the other involves fraudulent concealment. The discovery rule says the statute of limitations doesn't begin until a reasonable person like you, like the plaintiff, is on notice of the potential for injury. And that, Your Honor, is a key here because what we are saying is that under the discovery rule our claims couldn't have reasonably been discovered until the bearings news broke and it was understood that these auto parts conspiracies weren't restricted to passenger vehicles, to cars and pickup trucks, light pickup trucks, that there was something more here and that expanded out into the commercial-vehicle world.

So there is the discovery rule question which we

believe the cases are pretty clear raise question of fact, and then there is the issue of fraudulent concealment which I think comes into play when a contention is made, well, that plaintiff -- reasonable plaintiff should have known and that plaintiff can come back and make certain allegations and say, well, the defendant engaged in tricks and artifice, and we actually didn't have actual knowledge, and then there is the due-diligence questions. We make the same allegations that the Court has already found sufficient about tricks and artifice, we make the same allegations the Court has already found sufficient in other parts of this case about not having actual knowledge until we began our investigation after the bearings news broke.

And the defendants really focus in on the third prong, which is due diligence, but as the Court has decided time and again in the fuel senders case, in bearings and occupant safety restraints, the Court has pointed out the plaintiffs allege they have no knowledge and could not have discovered the conduct earlier through the exercise of reasonable diligence. We make exactly those allegations. We allege at paragraph 252 of our amended complaint we had no knowledge, we allege at paragraphs 255 and 263 of the amended complaint we could not have discovered the conspiratorial conduct or our injury to an exercise of reasonable diligence.

So we make the exact allegations this Court has

recognized time and time again creates an issue of fact, and here is really no different than those other cases although the particular circumstances the defendants point to are somewhat different issues --

THE COURT: Well, they are different because you already know that you've got this wire harness situation in automobiles. The question is --

MR. PARKS: Correct.

THE COURT: -- I think defendant raised, you know, is this enough to raise your curiosity?

MR. PARKS: And if it was, was there anything we could have done about it? There are a number of cases, and we cite them in our brief, that point out that even at the summary judgment level there is a responsibility on the defendant to come forward and say well, what could they have discovered that would have put them on notice of their claims if they had exercised an inquiry? And there is no discussion of that here at all, in fact, and it is a totally inappropriate discussion to have at the motion to dismiss stage. And, in fact, although defense counsel argued that it is routine or common, let's see, fairly typical to decide statute of limitations issues on a motion to dismiss, the case law says something else entirely.

For example, we cite to the Funduluc Bumper Exchange case out of the Eastern District of Wisconsin

which -- an opinion which cites Your Honor's opinion in one of the auto parts cases for the proposition that it is out of the ordinary to decide these questions of statute of limitations and due diligence and notice at the motion to dismiss level and that they are inherently factual in nature.

Another case, for example, I mentioned Board of Education of Evanston vs. Admiral Heating, that was a summary judgment case, not even a motion to dismiss, and the court really parsed the facts of what was known and whether that was enough to excite the plaintiff or not -- excite the plaintiff's inquiry or not, and the Court concluded it is a question for the jury.

We cite Morton's Market out of the 11th Circuit, a 1999 case, also a motion for summary judgment case, not a motion to dismiss. And the Court there points out that it is important to recognize that the obligation of the Court is to resolve all doubts in favor of the non-movant and it must be applied with particular stringency, the language of the Court, with particular stringency where plaintiff claims that defendant's conduct prevented plaintiff from discovering the claims prior to the expiration of the statute of limitations, and that's exactly what we have alleged here just like the other plaintiffs in the other auto parts cases, we have talked about the destruction of documents, we have talked about the secrecy of the procedures, we have talked about the

public and false denials of involvement and so forth.

And the point -- the court in Morton's Market also makes the following point, and I think it is important to keep in mind here, it is not enough for a defendant to point out facts that might have caused plaintiff to inquire or could have led to evidence supporting plaintiffs' claims, that evidence just creates the factual question for the jury, that just creates the disputed fact on the question, and it is for the jury to decide if that evidence was enough. That's exactly, Your Honor, where we would say we are here.

We also cite a number of other cases that I think stands for these same propositions. We cite In re: Copper Antitrust out of the 7th Circuit which itself reiterates the Morton's Market standard I just mentioned. We cited a case out of the Northern District of Ohio, In re: Polyurethane Foam, which applies the 6th Circuit standard and finds the complaint sufficient, and interestingly does what I think is a nice job of dealing with the potential tension of trying to understand what does the due-diligence requirement mean in a fraudulent-concealment scenario when the plaintiff is claiming I really didn't even know that I was hurt yet. And there the court points out that in that scenario alleging you didn't know and alleging you couldn't apply reasonable diligence have known creates a factual question and essentially adopts the exact analysis that Your Honor has

adopted in your prior decisions in this case considering that question.

We also cite In re: Petroleum Products, a Central District of California case, again, a summary judgment case, not a motion to dismiss. And there the court notes that the diligence requirement is only meaningful where facts exist that would excite the inquiry of a reasonable person, and essentially what they are saying there is that, as I read it, if the -- one of the prongs of the discovery rule isn't triggered, in other words, if you didn't know that you were injured yet, then you can't really have a particular useful discussion about how much diligence you did to figure out if you were injured, so I point that out only to re-emphasize, Your Honor, that we are not simply arguing the diligence point, we are actually arguing discovery rules as well and saying we didn't realize that we were potentially injured until this information came out in 2013 and 2014 that these conspiracies involving auto parts weren't specifically limited to passenger vehicles.

THE COURT: Okay.

MR. PARKS: Now, opposing counsel talked about the issue of the residency question and the standing question. We didn't speak that much about Constitutional standing, and I would simply on that issue say this Court has considered that question repeatedly and has, with the exception of the

public entities, determined that that question should be deferred until class certification. We would argue that we are much more like the auto dealers for whom the Court determined that it should be deferred than we are like the public entities where the Court said it shouldn't be, and there are a lot of unique considerations that the Court pointed out in its opinion and its citation of the Walker case about public entities, there are 11th Amendment considerations, there are considerations about who is even authorized to appear in court on behalf of state actors and so forth. Those are not here, we are in the same shoes and the same boat on this question as the auto dealers and that question has been decided by this Court repeatedly, and we respectfully suggest that the defendants haven't raised any reason why the Court should revisit what it has already done on that issue.

THE COURT: Do you want to address just very briefly that Vermont issue?

MR. PARKS: Sure. A couple of issues on the Vermont thing. First of all, we never allege that every vehicle we purchased or every vehicle the class purchased was for resale. They would like to impose that allegation on us but we don't allege it. And, in fact, common sense tells you, you know, from going to your local dealership -- local car dealership is a suitable example as any that a dealership

will purchase a number of vehicles not for resale. A truck dealership, for example, will have trucks, bigger medium-duty trucks for example, to ferry parts out to customers so they can do replacements and ship parts to customers that need to be delivered, there will be training vehicles for customers to learn on, there will be demos. These vehicles aren't sold, these vehicles are owned by a dealership and then used in the normal course of that dealership's business. So to say that every vehicle a dealership purchases must be for resale is inconsistent with common understanding and certainly nothing we have alleged.

On the question of whether we are in Vermont, we clearly are not in Vermont but we are advancing claims on behalf of dealerships in Vermont, and we would argue that at this point in the case at this juncture that's sufficient.

With respect to -- there is a somewhat different issue about the interstate nexus, and I would point out that's with I believe Mississippi, Nevada, New York, South Dakota and Wyoming. Our client -- or our clients are all part of a publicly-traded organization that is, as far as I know, the largest truck dealership operation in the United States. They sell vehicles to customers in every one of the 50 United States' states, and here where it is an indirect purchaser case and the injury in part when you purchase the vehicle with the overcharge built in but

manifests itself when you sell the vehicle not being able to pass the whole overcharge on, we would argue that selling to a customer in the state and not being able to pass the whole entire overcharge on and then being injured as a result creates a sufficient interstate nexus.

Now, I will grant you we don't specifically plead in the complaint that we sell in all 50 states including these states but we do, and if we need to amend to clarify that we can, but that's certainly our answer on the interstate nexus question.

THE COURT: Okay. Thank you.

MR. PARKS: Thank you.

THE COURT: Reply, briefly?

MR. MAJORAS: Thank you, Your Honor. I will jump around and address specifically the points that MR. PARKS raised.

First, he started off and talked about hindsight and whether there was a -- in Twombly there is hindsight, the statute of limitations there is not. I am not -- I don't mean to mischaracterize what he was saying, I know hindsight was in there, and I'm curious why. Hindsight isn't an issue on the statute of limitations. The question is has something occurred, has something, whether it is in the public record or something that you know of on your own, given you some curiosity as to whether you have a claim, and then you've got

this period of time, the three years or the four years, to make an inquiry into it, to learn whether there is a claim, to do anything else that you might do to see whether you can bring a claim. So it is not the situation ends at the moment that you're on notice.

THE COURT: You agree it is a jury question?

MR. MAJORAS: No, ma'am.

THE COURT: Or disagree with that?

MR. MAJORAS: I completely disagree with that. I think if you look at the cases that we cite, the 6th Circuit cases that we cite in our opposition brief on pages 13 and 14 make it very clear that the Court in a motion to dismiss stage with the record complete and with the objective standard that is available and the Dayco and the Ball cases, it is very clear that it is a gatekeeping function that the Court can exercise at that point. Now, if the Court were to disagree with this then it would still be an issue, and if it were then ultimately presented to a jury it would be a factual issue to the jury. It is kind of a rather interesting point that the plaintiffs are saying that it is not until the European Commission identified trucks, I believe, in 2014 that that somehow was the light bulb moment where we know we have a claim, yet four months later, five months later when these careful lawyers draft a complaint there is no mention of it.

The facts are very clear in terms of the publicity that's out there, there is really no disagreement about the publicity that's out there, there is no -- there should be no disagreement about the objective standard that the Court applies, and it is done throughout the 6th Circuit in the cases that we cite.

In the fraudulent concealment argument I think it is a pretty straightforward one, and this again goes to the Dayco decision where if the argument is this fraudulent concealment up to the point at which there is now some publicity or some information that's out in the record, that's a different matter. What they are trying to use fraudulent concealment for here is to say that notwithstanding the publicity that somehow erases, minimizes, I'm not sure what, to the publicity that is clearly in the record that we believe should have put them on notice at the time. So to take the fraudulent concealment aspect of the tolling of the statute of limitations is totally inapplicable to what is at issue in this case, and it is -- there is simply nothing they can allege including whether they made the sufficient inquiry under that standard to go forward that it somehow tolls the statute of limitations. The limitation period starts to run in February of 2010, there is no doubt about that, the publicity is strong, the publicity is clear.

THE COURT: Well, isn't it established that this

fraudulent concealment -- alleged fraudulent concealment existed prior to all of this publicity, and then once everything came out it was, you know, you didn't know it before because of the fraudulent concealment, but are there any indications of fraudulent concealment after this 2010 date?

MR. MAJORAS: There's nothing that has been pled. There's certainly -- the elements of fraudulent concealment have not been pled including the diligent inquiry that must be made once there is something suggesting that you should be taking a look at it, perhaps even a stronger standard than the statute of limitations. It is simply taking a standard that sounds like well, that should have something to do with statute of limitations and applying it in a situation where it clearly can have no effect because of the widespread publicity that existed at the time.

And finally, Your Honor, on the Vermont claim, we are kind of getting this again, well, maybe there is some aspect here that can save our Vermont claim, just like maybe there is something we can do to save our statute of limitations. So maybe somebody bought a truck that did this or maybe some people that buy trucks -- I'm not sure exactly all of the issues that were raised. The fact is none of that is alleged, there is nothing in the complaint that makes any of the allegations specific to Vermont, the statute is clear,

those claims should be dismissed.

Thank you, Your Honor.

THE COURT: All right. Thank you very much. All right. The Court will issue an opinion.

The next one is the MELCO defendants.

MR. SKLARSKY: Good afternoon, Your Honor. Charles Sklarsky appearing on behalf of Mitsubishi Electric.

THE COURT: Okay.

MR. SKLARSKY: Your Honor, the issue that we present -- and I should preface my remarks by saying that we have been very reticent to file motions to dismiss and have not done so in many cases taking into account Your Honor's prior rulings, but we filed a motion to dismiss in this case because it strikes us that the Rush Truck complaint is quite different than many of the other complaints this Court has had to rule on with respect to motions to dismiss. The issue is really a very simple one. The question is whether the fact that Mitsubishi Electric pled guilty to antitrust violations with respect to alternators, starters and ignition coils which were used in automobiles whether that is a sufficient fact to make the allegation that the plaintiffs have made here plausible, that is that because of that guilty plea it is somehow plausible that Mitsubishi Electric also participated in a conspiracy -- an antitrust conspiracy to fix the price of wire harnesses sold for trucks.

I'm not going to get into the debate of whether the trucks and the cars are a separate market or anything like that, but trucks are different from cars, and the issue of notice and suspicion is different than plausibility for the purposes of a complaint.

It is particularly troubling when in their complaint they do not even make the allegation that Mitsubishi Electric manufactured or sold wire harness parts for use in trucks and equipment. Of course they don't make that allegation because Mitsubishi Electric does not make wire harness parts for trucks and equipment.

Here is what they say in their complaint, and for Your Honor's reference most of these allegations are set forth at paragraphs 77, 78 and 79 at page 23. They bring out the fact of the guilty plea as to alternators, starters, ignition coils with respect to automobiles. They make the point that Mitsubishi Electric sold alternators, starters, ignition coils not only for automobiles but for trucks and equipment.

As to wire harness what they say is that Mitsubishi Electric made a body, an electric sensor, which is an electronic body unit, and that's true, we make it. They say we sell it to Fuji Heavy Industries, they don't say for what, but very telling they do not say that Mitsubishi Electric makes that part for use in trucks and equipment, and for the

reasons I have stated they can't say that. And they don't say that there is any RFQ with respect to this supposed conspiracy that Mitsubishi Electric had any association with. They don't allege any contacts with co-conspirators, alleged co-conspirators, with respect to the sale of wire harness parts for trucks and equipment. There is nothing.

What they say in their pleadings to justify this absence of facts is that, well, in the other cases Your Honor has looked at least in part to the guilty pleas of the defendant and weighed that or considered that in finding that it was plausible that there was a conspiracy to fix parts for which the defendant had not pled guilty, but in all of those others cases where Your Honor ruled that way there was at least an allegation that the defendant made and sold the part in question. And in many of those cases -- well, not only made and sold the part but made and sold the part in the market to which -- the same market in which they pled guilty, the automobile market, and in many of those cases there were also allegations which cited RFQs or contacts with competitors, there was more; there was not just this asking you to take this huge leap that a guilty plea over here in the automobile market somehow makes you plausibly guilty of price fixing in the truck market for a part that they can't even allege we make, and that's the argument. Your Honor has declined to do that in any other case -- actually I don't

think you have been confronted with that in any other case and you shouldn't do it now. Thank you.

THE COURT: Thank you. MR. PARKS?

MR. PARKS: Your Honor, the Mitsubishi motion is based on false premise, and the false premise is that the plaintiffs did not allege in the amended complaint that Mitsubishi sold wire harnesses for trucks and equipment. In fact, in paragraph 98 on page 28 of the amended complaint plaintiffs allege defendants and their co -- and the co-conspirators supplied vehicle wire harness systems to OEMs for installation in trucks and equipment manufactured and sold in the United States and elsewhere. Defendants and their co-conspirators manufactured vehicle wire harness systems, A, in the United States, including in all the states having laws permitting recovery of damages by indirect purchasers listed intra for installation in trucks and equipment manufactured and sold in the United States.

Skipping the parenthetical, B, in Japan and possibly other countries for export to the United States, and skipping the parenthetical, and installation in trucks and equipment manufactured and sold in the United States, and skipping a parenthetical, and, C, in Japan and possibly other countries for installation in trucks and equipment manufactured in Japan and possibly other countries for export to and sale in the United States. It is very specific, very

clear, includes all the defendants.

As this Court has noted, that type of allegation in this case when taken in connection with all the other allegations of the complaint including allegations of who the members of the conspiracy are and so forth is sufficient, so that's the false premise that the Mitsubishi Electric motion is based on.

I would also point out that we have alleged -- I think our allegations are a little more significant putting aside this allegation which I think goes right to the heart of Mitsubishi's contention. I would also point out that when you are looking at what circumstances render a conspiracy more plausible the fact that there are -- there is an existing and admitted conspiracy among manufacturers of wire harnesses for passenger vehicles, there are customers, including Fuji Heavy Industries, to whom Mitsubishi Electric sold wire harnesses that themselves through their subsidiaries make not only automobiles, Subaru I believe in the case of Fuji Heavy Industries, but also in that case construction equipment. So we are talking about sales of wire harnesses to entities whose subsidiaries actually make trucks and equipment.

I would also offer the following point for consideration: In a case like this where you have allegations of bid rigging as part of the structure of the

conspiracy, the lack of sales to any particular entity or even into a general part of the market -- a segment of the market doesn't demonstrate that you are not part of the conspiracy. In fact, these conspiracies can work by agreeing I will not sell to your customer in X market, and in exchange you agree to mark up or not try to sell to my customer in this other piece. So the lack of sales, if we get that far, and there is no affidavit or declaration or statement in the brief that they never sold directly contradicted by our allegation, but even if we credit that for a moment that in and of itself wouldn't be enough to say we are not in the conspiracy, and as this Court has recognized you have to view these allegations against the backdrop of these other conspiracies and the overall industry being rife with anticompetitive behavior and so forth. So I will leave it there unless Your Honor has questions?

THE COURT: No. Okay. Reply?

MR. SKLARSKY: If I may, Your Honor?

THE COURT: Do you want to address paragraph 98 or 99?

MR. SKLARSKY: Yes, it is true, it says what it says, there is no question about it, but it is boilerplate, defendants and others is what it says. Under the standard in the 6th Circuit and under Twombly it is our view, and I believe it is absolutely correct, you have to have something

specific, you have to have a particularized allegation as to what each of the defendants did. You can't just glom them all together and say that's enough and make the boilerplate allegation, and particularly in light of the fact they can't make that particularized allegation, and under the case law they need to do that under these facts.

And let me just say this if I might as to Counsel's last point that it is true, we don't disagree, a defendant could participate in a conspiracy by agreeing not to participate in the market, no question, that's true, but they don't make that allegation, they don't say that the reason Mitsubishi didn't make or sell these parts for trucks and equipment is because it had entered into an agreement not to participate in that market in exchange for some other benefit, they don't say that. That's not like they haven't had some discovery in this case, they have. They haven't had it from Mitsubishi Electric because we are a recently added defendant in the case, but other defendants who have been in the wire harness case for years now have produced discovery to these plaintiffs, and one would think if there were facts like that to say that our agreement was not to participate in the market we would see it in the complaint, that there would be a factual basis for it, and it's not there because there was no such agreement.

THE COURT: All right. Thank you. All right.

Next is Fujikura.

MR. RUBIN: Good afternoon, Your Honor. Mike Rubin of Arnold & Porter for Fujikura.

THE COURT: All right.

MR. RUBIN: And when I say Fujikura, there are two entities, there's Fujikura, Ltd., which is Fujikura's Japanese parent company that filed a Rule 12(b)(2) motion, and then there is a separate entity, a subsidiary in the U.S., Fujikura Automotive America, FAA, which has filed a 12(b)(6) motion. With the Court's permission I would like to address first the 12(b)(2) motion, allow plaintiffs to respond to that, and then come back and address the 12(b)(6) motion since they are separate issues?

THE COURT: Okay.

MR. RUBIN: So why is there no jurisdiction? It is really not very complicated. Fujikura, Ltd. did not make or sell wire harnesses for trucks and equipment. To use plaintiffs' counsel language, they didn't play in that totally different fundamentally different world, they didn't play in the trucks and equipment world. Nothing Fujikura, Ltd. made or sold has had any affect on these plaintiffs, that's undisputed. And this isn't your typical 12(b)(2) motion filed at the very beginning of the case. Plaintiffs have our transactional data, they have our documents, they have our declarations, they have discovery from other

defendants, they have had all of that for six months. No more discovery is needed on this point to determine that Fujikura, Ltd. did not make wire harnesses for trucks and equipment.

So what else is there? Well, there is no evidence that Fujikura, Ltd. engaged in any wrongful conduct relating to wire harnesses for trucks and equipment. The guilty plea, and this is not my words, it is plaintiffs' counsel words, but also happens to be true, was related to automobiles, cars, passenger vehicles, but in the words of the plea it was automobiles sold to an automobile manufacturer.

Plaintiffs again they have our documents, they have the guilty plea, they have the materials surrounding the guilty plea all of which are publicly available, documents from other defendants, interrogatory responses that lay out the nature of the conspiracy, transactional data, they have had all of that for more than six months. No more discovery is needed on this point, Your Honor. So these two facts which are undisputed, they have pleadings in their complaint but they have no evidence to rebut or even address the declarations that were submitted. In our 12(b)(2) motion they can't rest on their pleadings as they do in their opposition when there are declarations that directly refute their jurisdictional allegations.

So on these undisputed facts plaintiffs point to no

case, not a single one, from this auto part litigation or elsewhere where a court has exercised jurisdiction over a foreign company that, A, do not make a product that either directly or indirectly harmed the plaintiffs in any way, made its way to plaintiffs in any way; or, B, where the plaintiffs can point to no evidence of wrongful conduct aimed at the forum, aimed at these plaintiffs at the market which they allege.

Plaintiffs do mention three different tests for specific personal jurisdiction, the effects test, the stream of commerce plus test, the conspiracy theory test. It is unclear which one they are actually relying upon, Your Honor, because when you look at their opposition they state the test but they never then say how the facts of this case apply to those tests and how they meet the standards, so let's go through them one by one.

The effects test. Their language comes from the Weather Underground opinion from this Court. As its name suggests, the effects test requires effects on these plaintiffs from this defendant and from this defendant's intentionally tortious conduct, that's the Weather Underground standard.

But where Fujikura, Ltd. didn't sell parts that made their way into the products that these plaintiffs bought there can be no effects, and when plaintiffs can point to

nothing of intentionally tortious conduct aimed at this forum, aimed at these plaintiffs, there can again be no effects. The effects test with no effects means there is no jurisdiction.

You then have the stream of commerce plus test. They talk about Justice O'Connor's opinion, they talk about the cases that have applied it, they cite them -- I guess talk about them is not quite the right word because they cite them, they say it has been applied and adopted but they never then apply or talk about why those -- the stream of commerce plus case supported jurisdiction in the other cases and how this case is analogous, but the problem with the stream of commerce test for them is that it requires something being put into the stream of commerce that then flows through the stream of commerce to the plaintiffs and causes harm there. When Fujikura, Ltd. has never put anything into the stream of commerce itself or through any subsidiary in the U.S. that it controls, there can be no stream of commerce and there certainly isn't worth talking about whether there is a plus factor that is required.

This Court has already held in the bearings case with respect to AB SKF and wire harness with respect to S-Y Systems, that the stream of commerce plus test doesn't really apply in this case even where the foreign defendant has a U.S. subsidiary did put things in the stream of

commerce that made its way to the plaintiff. But here Fujikura, Ltd.'s U.S. subsidiary, FAA, and we will talk about this when we get to the motion to dismiss for FAA, but the affidavits were submitted for this motion as well, they did not sell anything for trucks and equipment at all.

Plaintiffs also, Your Honor, note the conspiracy theory which Your Honor has rejected multiple times, and in a footnote they urge you to reconsider that but we submit there is no reason to do so here. They talk about and they cite cases from this Court in which there were no declarations and the Court went by the pleadings, as the Court should have, in assessing the jurisdictional facts. They talk about the Court's Rule 12(b)(6) plausibility decisions but they don't apply in 12(b)(2), so they are left with nothing.

So they point to the two U.S. entities, Fujikura Automotive America, FAA, which never sold the parts for trucks and equipment at Fujikura Ltd.'s direction or otherwise, so FAA can't help them, although FAA is the entity that they do allege with respect to automobiles Fujikura, Ltd. acted through in the U.S.

After our initial motion to dismiss, Your Honor, plaintiffs amended their complaint to try to save it because they knew -- we had said, hey, you did nothing to tie Fujikura, Ltd. to the United States, so they added paragraph 53, which is these allegations about this joint venture. It

is a joint venture Fujikura, Ltd. did not control. As established, unrebutted in the declaration of Mr. Alexander, who is vice president of sales and marketing currently at FAA, but had the same position previously at the joint venture, the joint venture to the extent sold for trucks and equipment did not sell Fujikura LTD's parts, it sold the parts that the joint venture itself made. Fujikura, Ltd. -- the plaintiffs also affirmatively allege that Fujikura, Ltd. engaged in unlawful conduct through FAA but not the joint venture, and they don't allege the joint venture itself engaged in unlawful conduct, so they try to mix and match everything, they say this joint venture sold parts for trucks and equipment, it might not have been Fujikura parts but they sold parts for trucks and equipment, but they don't allege anything in the unlawful intentionally tortious conduct by or through that joint venture, they then say there was intentionally tortious conduct through FAA but they don't sell for trucks and equipment. They can't mix and match and put them together in large part because FAA didn't start operating, didn't make its first sale or anything until the joint venture was dissolved. The joint venture was dissolved in 2005, FAA didn't start operating until 2006.

This Court has been very cautious about pulling -- hauling, as the case law says, foreign defendants into this Court when there is not strong personal jurisdiction over

them. Foreign defendants who have no connection to the plaintiffs, who have done nothing to cause harm to these plaintiffs, should not be pulled into U.S. courts and have to defend themselves here, and we would ask this Court to dismiss Fujikura, Ltd. with prejudice.

THE COURT: Okay. Thank you. MR. PARKS?

MR. PARKS: Your Honor, it would be a relatively remarkable circumstance where a defendant who has been identified as a conspirator in a conspiracy in the United States, as Fujikura has here, is somehow said to be not subject to the jurisdiction of this Court when its already in front of this Court in this case. And this is different I would say than other foreign defendants who aren't in front of this Court, there aren't guilty pleas involving activity in the United States and in this forum in particular, there are for Fujikura. I would also say, Your Honor, that it is particularly remarkable where we allege that Fujikura, Ltd. was a participant in a joint venture that did sell wire harnesses for trucks and equipment during the conspiracy period in the United States. So I think those two facts distinguish this from some of the Court's other decisions where the entirety of the allegation was that there was a subsidiary's conduct here in the United States.

THE COURT: Okay. Thank you. Reply?

MR. RUBIN: Very brief rebuttal on that, and then I

will move right into the FAA motion with permission.

The Court has already held that a subsidiary that is owned and controlled by a foreign defendant happens to sell the product in the U.S. does not subject the foreign defendant to jurisdiction. It will be odd for the Court respectfully to then now hold that participation as a minority non-controlling shareholder in a joint venture, that did not sell the foreign company's products would somehow pull the foreign company into the United States for personal jurisdiction purposes. A subsidiary that is controlled versus a joint venture that is not controlled, it is unclear how the joint venture would extend jurisdiction when this subsidiary would not.

In terms of the fact that Fujikura is already in front of this Court in the automobile cases and cases that involve vehicles that include automobiles doesn't mean that every plaintiff gets to haul the foreign defendant into this Court, that's what general jurisdiction is. Specific jurisdiction has to be tied to the specific plaintiffs.

This Court's effects test in Weather Underground talk about intentionally tortious conduct aimed at this forum causing harm to these plaintiffs, not other plaintiffs but these plaintiffs, Your Honor. That's lacking here, the fact that this Court has exercised jurisdiction and that Fujikura, Ltd. has not challenged jurisdiction in the automobile -- the

cases that arise out of automobiles and other vehicle but include automobiles that arise from the guilty plea speaks volumes to the fact that we are challenging it here.

THE COURT: Thank you. Okay. You want to go on?

MR. RUBIN: Yes, I would, Your Honor.

An essential element of the plaintiffs' claim is obviously harm to these plaintiffs. Plaintiffs' basic argument is that their pleadings here against FAA are sufficient because similar plaintiffs or similar pleadings by other plaintiffs have been found to be sufficient in other MDL cases, but plaintiffs' counsel got up here and I -- the quote was -- I'm not going to try to quote it, I will paraphrase it, the record will be what it is, that this is the first set of plaintiffs that are bringing claims for trucks and equipment and not including automobiles, that all of those other activities, all of those other cases were all about cars, that the car world and trucks and equipment world are fundamentally different. It is hard to square that with saying that this Court should simply do what it did with cars and apply it to trucks and equipment, and do that when the plaintiffs fail to allege that Fujikura Automotive America had anything to do with trucks and equipment.

These plaintiffs are unlike anyone that have come before this Court and their allegations against FAA are like anyone who has come before this Court. First, of course,

they exclude the automobiles, and this was by their own design specifically to try to set themselves apart from the auto dealers, and then they argue for statute of limitations purposes that the facts about automobiles wasn't even enough to raise a suspicion but now it makes it plausible.

Secondly, these claims by the plaintiffs against FAA are different because they do not actually allege that FAA purchased parts -- I'm sorry, that they purchased parts from FAA. I know we will hear about paragraph either 98 or 99 about the all-defendant allegations, and I reread their opposition last night, Your Honor, and I noted that they have a whole bunch of quotes from the complaint, notably not a single one of them says anything about FAA, it is all of these other defendant allegations, all defendants have done this, defendants and their co-conspirators have done that. We know the 6th Circuit says that's not enough.

We also know this Court has distinguished the 6th Circuit's holdings in the past by combining allegations about the market structure with guilty pleas concerning that market, and the fact that each defendant allegedly sold the parts to these -- that were made in either directly or indirectly of the products the plaintiffs purchased. The Court has never faced a case which there is no guilty plea connecting anyone to this market according to plaintiffs themself. The Court has never faced a case where the

plaintiffs do not allege because they know they can't that they purchased parts from the defendant that is moving.

They had their chance, Your Honor. We filed this motion before, they chose not to respond to it and they chose to amend their complaint. They did the best they could with the facts they had. They added paragraph 53 about the joint venture, we just spoke about that, but that paragraph doesn't even allege that FAA was involved in the joint venture. It is very careful gymnastic pleadings where they've been and contort themselves into a pretzel in order to define Fujikura in paragraph 52 as either Fujikura, Ltd. or FAA and then they say Fujikura, quote/unquote, sold through this joint venture, but except for a moment that they -- that FAA did sell through this joint venture, that's -- or the joint venture sold something or somehow connected, put away the temporal chronology, and just imagine that they don't allege any wrongful conduct by the joint venture either, and to state a plausible claim they need to say somewhere in their complaint the joint venture did something wrong or Fujikura acted wrongly, broke the law through the joint venture. They do that for a Fujikura, Ltd., they allege that Fujikura, Ltd. engaged in its unlawful conduct through FAA for automobiles, there is nothing similar for trucks and equipment with respect to the joint venture.

But, Your Honor, this motion is different than I

think every one that you faced before in which you denied the 12(b)(6) motion because the Court doesn't here need to play with the pleadings, doesn't need to assess whether really all defendants' allegations are sufficient because the Court has in front of it declarations that are undisputed that provide that despite the allegation that all defendants sold wire harness parts that went into trucks and equipment, that's now refuted by allegation -- by affidavits and other evidence saying we did it. They want to rest back on their pleadings but the Court can and should convert this to a Rule 56 if there is any doubt about the sufficiency of the pleadings, and in doing so the Court need not give the plaintiffs more time for discovery. Again, as I indicated earlier, they have had our discovery for six months. We are not --

THE COURT: Let me just ask this to clarify again, FAA didn't come into existence until this joint venture was dissolved?

MR. RUBIN: Correct, and then FAA did not itself sell parts for trucks and equipment, so it wasn't connected to the joint venture itself when it came into existence, didn't sell any parts that made it into the products that these plaintiffs purchased.

So what do they have in terms of discovery that could help them corroborate what we are saying or challenge it? Well, they have transactional data, five minutes they

could have looked through the transactional data and confirmed for themselves that FAA has no sales before 2006. Ten minutes later they could have gone through the list of customers to whom FAA sold products and discovered that there are no trucks and equipment OEMs on that list. Probably an hour long exercise they could have run the name of the joint venture through the two million pages of documents we have produced and have the full history of the joint venture and FAA's commencement after the dissolution of the joint venture. A couple hours they could have read interrogatory responses from FAA, from Fujikura, Ltd., from all the other defendants both in other parts cases and then in this case as well -- I'm sorry, in the wire harness parts cases but for the direct purchasers and indirect purchasers, and would have found nothing linking FAA to trucks and equipment or wrongful conduct relating to trucks and equipment.

Plaintiffs have known we are not in the trucks and equipment business since the spring when we told them during the meet and confers, and we also told them we weren't excluding trucks and equipment because other plaintiffs have asked for those. In their discovery they said we want anything dealing with any type of motor vehicle, and we didn't object to that, and so we see a document, it mentions trucks and equipment, it gets produced regardless of the fact that we don't sell for those parts. If it mentions it they

have it.

They had six months to run more extensive searches to find something, and they made a strategic decision not to do that, Your Honor. Presumably they want me to tell this Court we need more time, we need discovery, we need something else, but that type of decision-making, that type of strategic gamesmanship should not justify holding FAA to the burdens and pulling FAA through the burdens of further discovery, further litigation in this case when this Court can and should resolve this either on a 12(b)(6) motion or convert it to summary judgment.

THE COURT: Okay. Thank you. Response?

MR. PARKS: Yes, Your Honor.

THE COURT: MR. PARKS.

MR. PARKS: Your Honor, our complaint is clear that there is a broad conspiracy involving wire harnesses that initially was thought to be limited to passenger vehicles but subsequently based on subsequent discovered information was actually broader and included commercial vehicles. We have alleged that the Fujikura entities were involved in that conspiracy, and Fujikura understands I believe based on the fact that it has introduced matters outside of the pleadings that if this Court is considering the question purely on the pleadings the 12(b)(6) motion should be denied, so Fujikura has come forward with declarations from certain of its folks

about what it did and didn't do and the folks to whom it did and didn't sell. Our position on that, Your Honor, is that it is in this Court's discretion to decide whether to permit discovery on those -- further discovery on those issues.

Now, counsel for Fujikura points out that we have had documents from them for some time, that's true. We also are the recipients of literally millions, Your Honor, millions of pages of paper in this case. We came into this case as is clear from discussions today much later than everyone else. We filed our wire harness complaint November of 2014. Other parties in this case have had literally years to begin to digest the millions of pages of paper in this case, we have had months, and we certainly haven't had the opportunity to examine the particular issues identified in these declarations. We certainly haven't obviously had the opportunity to depose these witnesses and dig into exactly what -- how accurate those allegations are and what documents may undermine them or add different nuances or shed different light on the issue. We would ask the Court for that opportunity.

Now, I think it is particularly appropriate here, Your Honor, since it is not going to change the scope of discovery in this case in any meaningful way. As counsel for Fujikura has said, they are producing documents about vehicles irrespective of cars or commercial vehicles or what

have you, so that part of the process is already ongoing. There are protocols in place about how long the depositions are going to be in this case and who is going to have to ask questions and so forth. Those depositions aren't going to be materially longer, if any longer, based on some of the inquiries that we would make on these issues. I understand if we are talking about bringing a party that is not otherwise in the case or introducing aspects of new depositions, new discovery that is not otherwise involved, that the Court might say, well, you know, on a Rule 56 scenario and in balancing these various considerations I will want to deal with this now, but here, Your Honor, it is not going to change the scope of discovery to allow these claims to proceed, and it is, we would contend, considerably unfair given the volume of the information that has been thrust upon us in this case to have to deal with trying to cobble together responses to the assertions in these declarations under these circumstances and without the benefit of the deposition testimony.

But as a starting point and as an ending point I would say that the fact that there is Rule 56 requests here on these matters outside of the pleadings introduced by Fujikura I think demonstrates that they know fully well the allegations are sufficient against the Fujikura entities and that they are trying to move this into a scenario where they

can add additional facts and rebut some of the facts we have alleged.

THE COURT: Okay.

MR. RUBIN: Very briefly, Your Honor. The pleadings are not sufficient. I think we have walked through and explained why they are not sufficient, especially in the context of this case, especially in the case where the plaintiffs have walked away from the guilty pleas that support and bolstered this Court's prior Rule 12(b)(6) decisions, but the fact that we have some very narrow facts that compel judgment in our favor that are not reasonably subject to a dispute, that are easily verifiable, that we didn't sell these parts for trucks and equipment, and that the guilty plea relates to automobiles, not trucks and equipment, a point they concede, and that there is no other evidence that they point to or allege that somehow ties us to the truck and equipment market, the Court can if there is any question decide this on Rule 56.

In terms of discovery burdens, the fact that truck and equipment dealers are going to be asking questions may very well lead other plaintiffs to say we didn't get enough time. Not only do we face the trucks and equipment dealers, we also have Ford who is going to be asking questions of Fujikura at depositions. It would not surprise me for the plaintiffs to not be able to agree on how they allocate time.

I believe there would be additional burdens, additional preparation needed for witnesses, and just simply the costs of monitoring the litigation, reviewing briefs, reviewing their briefs, reviewing discovery, participating in discovery from Rush Trucks is substantial and is not a justification when the facts are clear when they have had a single summary judgment motion pending for -- I think the briefing in this has lasted four months.

They have a single defendant's documents they could have run searches through, found documents and looked at them on these particular points. They've served discovery, they've gotten their responses, we have verified interrogatory responses to them stating that no -- actually, Your Honor, they were objections but objecting on the basis of and representing as counsel and also sworn affidavits that we didn't sell these parts for your vehicles. Under these facts the Court should not delay resolving this case at this point. Thank you, Your Honor.

THE COURT: Thank you. Thank you very much. I will issue opinions as soon as we can. Thank you.

THE LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 3:40 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Automotive Parts Antitrust Litigation, Case No. 12-md-02311, on Tuesday, October 6, 2015.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 10/16/2015

Detroit, Michigan